



## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2020-0021; Notice 2]

### Mercedes-Benz USA, LLC, Grant of Petition for Decision of Inconsequential

#### Noncompliance

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Grant of petition.

**SUMMARY:** Mercedes-Benz AG (MBAG) and Mercedes-Benz USA, LLC (MBUSA) (collectively, “Mercedes-Benz”) have determined that certain model year (MY) 2019 Mercedes-Benz A-Class motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 104, *Windshield Wiping and Washing Systems*. Mercedes-Benz filed a noncompliance report dated February 24, 2020. Mercedes-Benz subsequently petitioned NHTSA on March 12, 2020, and later provided supplemental material on July 9, 2020, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces the grant of Mercedes-Benz’s petition.

**FOR FURTHER INFORMATION CONTACT:** Neil Dold, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366-7352, facsimile (202) 366-3081.

#### SUPPLEMENTARY INFORMATION:

##### I. Overview:

Mercedes-Benz has determined that certain MY 2019 Mercedes-Benz A-Class motor vehicles do not fully comply with the requirements of paragraph S4.1.2 of FMVSS No. 104, *Windshield Wiping and Washing Systems* (49 CFR 571.104). Mercedes-Benz filed a noncompliance report dated February 24, 2020, pursuant to 49 CFR part 573, *Defect and noncompliance responsibility and reports*. Mercedes-Benz subsequently petitioned NHTSA on

March 12, 2020, and later provided supplemental material on July 9, 2020, for an exemption from the notification and remedy requirements of 49 U.S.C. chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for inconsequential defect or noncompliance*.

Notice of receipt of Mercedes Benz's petition was published with a 30-day public comment period, on June 12, 2020, in the ***Federal Register*** (85 FR 35990). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Then follow the online search instructions to locate docket number "NHTSA-2020-0021."

## **II. Vehicles Involved:**

Approximately 4,145 MY 2019 Mercedes-Benz A220 and A220 4MATIC motor vehicles manufactured between August 3, 2018, and November 26, 2019, are potentially involved.

## **III. Noncompliance:**

Mercedes-Benz explains that the noncompliance is that the windshield wiping systems in the subject vehicles do not wipe the percentage of the windshield as required by paragraph S4.1.2 of FMVSS No. 104. Specifically, because of variations in the manufacturing process, the windshield wiping system may not meet the manufacturer's design specifications and thus may only wipe 93.8% of Area B of the windshield instead of the 94% minimum required.

## **IV. Rule Requirements:**

Paragraph S4.1.2 of FMVSS No. 104 includes the requirements relevant to this petition. When tested wet in accordance with SAE Recommended Practice J903a (1966), each passenger car windshield wiping system shall wipe the percentage of designated Areas A, B, and C of the windshield (established in accordance with S4.1.2.1) that (1) is specified in column 2 of the applicable table following subparagraph S4.1.2.1 and (2) is within the area bounded by a perimeter line on the glazing surface 25 millimeters from the edge of the "daylight opening."

## **V. Summary of Mercedes-Benz's Petition:**

The following views and arguments presented in this section, “V. Summary of Mercedes-Benz's Petition,” are the views and arguments provided by Mercedes-Benz and do not reflect the views of the Agency. Mercedes-Benz described the subject noncompliance and contended that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, Mercedes-Benz submitted the following:

1. Mercedes-Benz cited the definition of “motor vehicle safety” as cited in the National Traffic and Motor Vehicle Safety Act of 1966 and their belief is that this matter is appropriate for a decision that the noncompliance is inconsequential to motor vehicle safety as it does not present any increased risk to vehicle occupants.
2. They state that, in the subject vehicles, the portion of the windshield that falls just below the minimum wiped area is located at the outer edge of the windshield. In the worst-case scenario, only 93.8%, instead of the minimum 94%, of the Area B portion of the windshield remains *wiped* (note: the petition erroneously stated “unwiped” rather than “wiped”). In the original petition, Mercedes-Benz stated that the affected portion of Area B is located at the outer edge of the passenger's side of the windshield; however, in a subsequent communication with NHTSA, they clarified that the affected portion of Area B is located at the outer edge of the driver's side of the windshield rather than the passenger's side.
3. Mercedes-Benz asserts that NHTSA has previously considered the performance of windshield wiper systems in the context of interpreting the meaning of the term “daylight opening” in FMVSS No. 104. Mercedes-Benz says that in 2003, in response to a request from a manufacturer, NHTSA interpreted that opaque coatings located around the edge of the windshield would not be considered part of the daylight opening for purposes of calculating the starting point of the wiped area. *See* Letter to Reed, May 6, 2003. This interpretation was an apparent change in approach

for several manufacturers. In a request for reconsideration, the industry reported that many vehicles would not meet the minimum wiped portion of Area B based on the Agency's new interpretation. In supporting comments, two manufacturers reported that there were multiple vehicle models that would not meet the 94% minimum requirement for Area B. For one of the manufacturers, all of its vehicles were no more than 93.2% of the Area B minimum, while the other manufacturer did not provide specific information on how far its system deviated from the Area B minimum. After considering the substantial resources necessary to redesign the wiper systems outside of the normal vehicle refresh schedule, the Agency delayed the date on which it would begin enforcement of FMVSS No. 104 based on its updated interpretation. *See* Letter to Strassburger, January 7, 2005.

4. Thus, while the Agency was alerted to the fact that certain vehicles would not be able to comply with the minimum wiped area requirements of FMVSS No. 104, the Agency delayed implementing enforcement of the new interpretation for several years. While the delay was based, in part on the additional complexities needed to update the vehicle, fundamentally, the small deviation in the minimum wiped area requirement appears to not have been considered one that adversely impacted driver visibility or increased the safety risk to vehicle occupants. In that case, the deviation from the minimum wiped portion of Area B was more than what exists in the subject vehicles. While it is unclear from the interpretation letters what portion of Area B did not meet the minimum wiped requirements, in the subject vehicles, only a narrow strip of a portion of the outer edge of the driver's side of the windshield is affected by the deviation. Due to the location and small size of the unwiped area, the deviation would not affect the visibility of the driver or their ability to safely operate the vehicle and would not lead to an overall increased safety risk to the vehicle occupants.

5. Mercedes-Benz stated that the windshield wiper systems installed in the subject vehicles otherwise meet or exceed the remaining requirements in FMVSS No. 104 for the wiped portion of Areas A and C, for wiper frequency, and the windshield washing system. Mercedes-Benz has not received any reports related to a lack of visibility due to the performance of the windshield wiping system at issue here.

Mercedes-Benz concluded by again contending that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

Mercedes Benz's complete petition and all supporting documents are available by logging onto the Federal Docket Management System (FDMS) website at: <https://www.regulations.gov> and by following the online search instructions to locate the docket number as listed in the title of this notice.

## **VI. NHTSA's Analysis:**

The burden of establishing the inconsequentiality of a failure to comply with a *performance requirement* in a standard—as opposed to a *labeling requirement with no performance implications*—is more substantial and difficult to meet. Accordingly, the Agency has not found many such noncompliances inconsequential.<sup>1</sup> Potential performance failures of safety-critical equipment, like seat belts or air bags, are rarely deemed inconsequential.

An important issue to consider in determining inconsequentiality based upon NHTSA's prior decisions on noncompliance issues was the safety risk to individuals who experience the type of event against which the recall would otherwise protect.<sup>2</sup> NHTSA also does not consider

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<sup>1</sup> Cf. *Gen. Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897, 19899 (Apr. 14, 2004) (citing prior cases where noncompliance was expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers).

<sup>2</sup> See *Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 35355 (June 12, 2013) (finding noncompliance had no effect on occupant safety because it had no effect on the proper operation of the occupant classification system and the correct deployment of an air bag); *Osram Sylvania Prods. Inc.; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 46000 (July 30, 2013) (finding

the absence of complaints or injuries to show that the issue is inconsequential to safety. “Most importantly, the absence of a complaint does not mean there have not been any safety issues, nor does it mean that there will not be safety issues in the future.”<sup>3</sup> “[T]he fact that in past reported cases good luck and swift reaction have prevented many serious injuries does not mean that good luck will continue to work.”<sup>4</sup>

Arguments that only a small number of vehicles or items of motor vehicle equipment are affected have also not justified granting an inconsequentiality petition.<sup>5</sup> Similarly, NHTSA has rejected petitions based on the assertion that only a small percentage of vehicles or items of equipment are likely to actually exhibit a noncompliance. The percentage of potential occupants that could be adversely affected by a noncompliance does not determine the question of inconsequentiality. Rather, the issue to consider is the consequence to an occupant who is exposed to the consequence of that noncompliance.<sup>6</sup> These considerations are also relevant when considering whether a defect is inconsequential to motor vehicle safety.

NHTSA has evaluated the merits of the inconsequential noncompliance petition submitted by Mercedes-Benz and has determined that this particular noncompliance is inconsequential to motor vehicle safety. Specifically, the Agency considered the following when making its decision:

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occupant using noncompliant light source would not be exposed to significantly greater risk than occupant using similar compliant light source).

<sup>3</sup> *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21666 (Apr. 12, 2016).

<sup>4</sup> *United States v. Gen. Motors Corp.*, 565 F.2d 754, 759 (D.C. Cir. 1977) (finding defect poses an unreasonable risk when it “results in hazards as potentially dangerous as sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future”).

<sup>5</sup> *See Mercedes-Benz, U.S.A., L.L.C.; Denial of Application for Decision of Inconsequential Noncompliance*, 66 FR 38342 (July 23, 2001) (rejecting argument that noncompliance was inconsequential because of the small number of vehicles affected); *Aston Martin Lagonda Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 41370 (June 24, 2016) (noting that situations involving individuals trapped in motor vehicles—while infrequent—are consequential to safety); *Morgan 3 Wheeler Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21664 (Apr. 12, 2016) (rejecting argument that petition should be granted because the vehicle was produced in very low numbers and likely to be operated on a limited basis).

<sup>6</sup> *See Gen. Motors Corp.; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897, 19900 (Apr. 14, 2004); *Cosco Inc.; Denial of Application for Decision of Inconsequential Noncompliance*, 64 FR 29408, 29409 (June 1, 1999).

1. Given the inconsistent information in the petition about which portions of the windshield did not meet the Standard, NHTSA requested additional information from Mercedes-Benz. On July 9, 2020, Mercedes-Benz responded, and the supplemental information provided is available on the FDMS website.<sup>7</sup> In the worst-case scenario presented in this data, Area C is completely (100%) wiped, as required by the standard. Area A, according to this data, has a wiped area of 91% – exceeding the standard’s minimum threshold of 80% – while the wiped portion of Area B is slightly below the required minimum 94% threshold at 93.8%.
2. The magnitude of the deviation from Mercedes-Benz’s design specification was also considered. Vehicles manufactured without deviation from Mercedes-Benz’s specification would have wiped 91.4% of Area A and 94.3% of Area B. In the worst-case scenario described by Mercedes-Benz, comparing the manufacturing deviation to Mercedes-Benz’s design specification, the percent of Area A wiped decreases by 0.4% to the aforementioned 91% of Area A’s total area and the percent of Area B wiped decreases by 0.5% to the aforementioned 93.8% of Area B’s total area. There is no change in the wiped portion of Area C (the area of the windshield directly in front of the driver).
3. NHTSA also considered the location within Area B affected by the manufacturing deviation. The reduction in wiped area is located at the outer edge of Area B on the driver’s side – with greater deviation in wiper coverage toward the top of the windshield – where the impact to visibility is less likely to create a safety risk. A depiction of the wiper deviation was provided by Mercedes-Benz in the petition and was updated on July 9, 2020, after NHTSA requested additional information. Both depictions are available on the FDMS website.

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<sup>7</sup> [Regulations.gov/docket/NHTSA-2020-0021](https://www.regulations.gov/docket/NHTSA-2020-0021).

4. Although Mercedes-Benz's petition cited a letter of interpretation that delayed enforcement of the threshold for minimum wiped area for Area B, NHTSA did not consider this to be persuasive. The delay at issue resulted from the agency's determination that strict enforcement would be inequitable. NHTSA did not determine that the requirements of the Standard should be relaxed. Our analysis here is based on the location and magnitude of the specific noncompliance as detailed in this notice and the documents included in the docket.
5. NHTSA has determined, based on both the magnitude and the location of the wiper deviation, that the difference between a compliant vehicle (produced without the manufacturing deviation) and a worst-case noncompliant vehicle (produced with the manufacturing deviation) is unlikely to impact visibility in a manner that would be consequential to safety.

## **VII. NHTSA's Decision:**

In consideration of the foregoing, NHTSA finds that Mercedes-Benz has met its burden of persuasion that the subject FMVSS No. 104 noncompliance in the affected vehicles is inconsequential to motor vehicle safety. Accordingly, Mercedes-Benz's petition is hereby granted, and Mercedes-Benz is exempted from the obligation of providing notification of, and a free remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject vehicles that Mercedes-Benz no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of



the noncompliant vehicles under their control after Mercedes-Benz notified them that the subject noncompliance existed.

(**Authority:** 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.)

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